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No. 91-1784

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In the Supreme Court of the United States

OCTOBER TERM, 1992

GUY LEONARD PRINCE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court violated Fed. R. Crim. P. 31(d) by questioning a juror for the purpose of clarifying his answer during a poll of the jury.

2. Whether the district court's failure to record bench conferences concerning the polling of the jury warranted a new trial.

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OPINIONS BELOW

The opinions of the court of appeals remanding the case to the district court (Pet. App. A1-A16) and affirming the decision of the district court (Pet. App. A17-A22) are unreported, but the decisions are noted at 902 F.2d 1570 (Table) and 944 F.2d 906 (Table).

JURISDICTION

The judgment of the court of appeals was entered on September 6, 1991. The petition for rehearing was denied on March 4, 1992. Pet. App. A44. The petition for a writ of certiorari was filed on May 8, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Ohio, petitioner was convicted of conspiring to possess cocaine with intent to distribute it, in violation of 21 U.S.C. 846; and carrying a firearm in furtherance of the conspiracy, in violation of 18 U.S.C. 924(c). He was sentenced to 181 months' imprisonment. Pet. App. A26, A29. The court of appeals affirmed. *Id.* at A17-A22.

1. Petitioner and his co-defendants were indicted in connection with their attempt in November 1987 to purchase cocaine from a government informant and an undercover narcotics agent. Pet. App. A2-A3. At trial, the jury deliberated for three hours and then sent a note to the district court indicating that it was deadlocked at 11-1 on all counts, and that the juror voting for acquittal "claimed there is nothing that could change his mind." The district court advised the jury to continue deliberating. Forty-five minutes later, it returned a unanimous verdict of guilty on all counts. *Id.* at A9.

According to the record made at trial, Juror No. 2 (Mr. Odom) was asked by the clerk during the poll of the jury whether "the verdicts that I have just read into the record, are these your verdicts, sir?" and responded "Yes." Pet. App. A9. At the conclusion of the poll, however, counsel for one of the defendants objected to discharging the jury because he thought Odom had said something to indicate that he agreed with only some of the verdicts. *Ibid.* The following colloquy ensued:

> THE COURT: Mr. Odom, please stand. Juror No. 2.

Mr. Odom, when the Clerk asked you if the verdicts as just read into the record, were these your verdicts, did you say yes?

MR. ODOM: I said semi.

THE COURT: You said what?

MR. ODOM: Semi.

THE COURT: Did you sign—did you sign the verdict form?

MR. ODOM: I was talked into it. I was talked into it.

* * * * *

THE COURT: All right. I'm going to send you back and continue your deliberations, and I'm going to bring you back into the Courtroom.

Now, I want to ask you a question, again. Stand up. You participated in the deliberations?

MR. ODOM: Yes, I did.

THE COURT: And after discussion, after the foreman of the jury sent the question out to the Court and I sent my answer back to continue your deliberations, you say you were talked into voting for a conviction?

MR. ODOM: Pretty much.

THE COURT: All right. But you did vote yes for conviction, is that correct? You did agree, you did vote yes for a conviction along with the other 11 members of the jury?

MR. ODOM: Not at first.

* * * * *

THE COURT: But you did finally?

MR. ODOM: Yes.

THE COURT: So your signature on the verdict form . . . that is your signature? That means that you voted yes in accordance with the verdict form, is that correct?

MR. ODOM: Yes.

Pet. App. A9-A10. Over the objections of defense counsel, the court then accepted the verdicts of guilty and discharged the jury. *Id.* at A10.

2. On appeal, the court of appeals rejected petitioner's challenge to the district court's acceptance of the verdict and discharge of the jury following the poll. The court of appeals acknowledged that a defendant would be seriously prejudiced if a district court coerced a juror into "surrendering his conscientiously held view that the defendant should be acquitted." Pet. App. A11. It held, however, that no such coercion occurred here. Rather, the court observed, the trial judge in this case did no more than question a juror to clarify his response to the poll. The court of appeals distinguished this case from one in which "a juror, having indicated some reluctance to express con-currence during a jury poll, is required to cast a vote in open court." Here, in contrast,

> [o]nce the juror explained that, while he did "[n]ot at first" vote with the other jurors, but "finally" did so after he was "[p]retty much" "talked into it," the court was warranted in concluding that the juror had arrived at his verdict through the

> type of deliberative process in which juries are expected to engage; that he had in fact voted for a verdict of guilty and had not changed that vote when polled; and that the jury unanimously concurred in the verdict.

Ibid. Although the court of appeals said that the better course might have been to permit the attorneys in the case to question the juror, it found that, in the circumstances of this case, the district court did not abuse its discretion by questioning the juror as it did. *Id.* at A12.

Petitioner also claimed that the district court violated 28 U.S.C. 753(b) by failing to record bench conferences at which petitioner's attorney objected to the conduct of the jury poll.[1] Pet. App. A5-A6. Relying on *United States* v. *Gallo*, 763 F.2d 1504 (6th Cir. 1985), cert. denied, 475 U.S. 1017 (1986), the court of appeals ruled that a violation of the recording requirement did not mandate reversal unless the defendants could demonstrate prejudice. The court remanded the case to the district court "to address the effect of its failure to adhere to the requirements of 28 U.S.C. § 753." Pet. App. A7.

On remand, the district court determined that petitioner and his co-defendants were not entitled to a new trial. Pet. App. A34-A42. The court of appeals affirmed that ruling. *Id.* at A17-A22. Noting that the district court had transcribed the colloquy between the court and juror Odom, as well as the defendants' objections to the ultimate discharge of the jury, *id.* at A20-A21, the court observed that petitioner and his co-defendants had failed to demonstrate "how a

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[1] That statute requires that a reporter shall * * * "record[] verbatim by shorthand, [or by] mechanical means * * * (1) all proceedings in criminal cases had in open court."

verbatim account of what was said in any of the bench conferences could possibly have shown that they are entitled to new trials." *Id.* at A21.

ARGUMENT

1. Fed. R. Crim. P. 31(d) provides that if, upon the poll of the jury, "there is not unanimous concurrence, the jury may be directed to retire for further deliberations or may be discharged." Petitioner contends (Pet. 8-11) that the district court violated the Rule by attempting to clarify juror Odom's response to the jury poll. That Rule, petitioner argues, gives the court only two options—discharging the jury with a mistrial, or directing the jury to resume deliberations; it does not allow the court to address additional questions to the jury.

The flaw in petitioner's argument is that the two options set forth in Rule 31(d) apply only when it becomes clear that "there is not unanimous concurrence." Nothing in Rule 31(d) forbids a court from questioning a juror to determine whether there is or is not unanimous concurrence in the announced verdict.

Contrary to petitioner's suggestion (Pet. 9-10), neither the Fifth Circuit nor any other court of appeals bars the judge from questioning a juror to clarify an ambiguous response to a jury poll. See, *e.g.*, *United States* v. *Duke*, 527 F.2d 386, 394 (5th Cir.) (permitting questions addressed to juror to clear up ambiguous response during jury poll), cert. denied, 426 U.S. 952 (1976).[2] Moreover, the courts in *Amos* v. *United*

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[2] The court in *Duke* distinguished its earlier decision in *United States* v. *Sexton*, 456 F.2d 961 (5th Cir. 1972), on which petitioner relies. In *Sexton*, the trial judge "had virtually forced a juror to make a decision in open court by asking a juror, who stated that he had not voted either way, whether

States, 496 F.2d 1269 (8th Cir.), cert. denied, 419 U.S. 896 (1974), and *United States* v. *McCoy*, 429 F.2d 739 (D.C. Cir. 1970), did not state a categorical rule that the jury must always be required to resume deliberation following an inquiry into a juror's ambiguous response. Rather, the courts of appeals have uniformly held that, when a juror's response to a poll is unclear, the court may question a juror to clarify his answer, and that if the answer makes clear that the juror concurred in the verdict, the court may accept the verdict as unanimous. See, *e.g.*, *Williams* v. *United States*, 419 F.2d 740, 746 (D.C. Cir. 1969) (en banc) (evidence during a jury poll of a juror's uncertainty "does not require setting the trial at naught," since further inquiry "can serve to clear up apparent confusion" concerning the juror's verdict), cert. denied, 409 U.S. 857 (1972); *United States* v. *Hernandez-Garcia*, 901 F.2d 875, 877-878 (10th Cir.), cert. denied, 111 S. Ct. 125 (1990); *United States* v. *Tapanes*, 685 F.2d 1291, 1292 (11th Cir. 1982); *Amos* v. *United States*, 496 F.2d at 1273. In so holding, the courts have recognized a "distinction in law and in fact between actions of the trial judge to obtain clarity in place of confusion, and actions that produce a likelihood that a juror has been coerced." *Williams* v. *United States*, 419 F.2d at 746; *United States* v. *Duke*, 527 F.2d at 394 (differentiating between "the conduct of a trial judge who attempts to obtain clarity and that of a trial judge who attempts to coerce a final verdict"); *Amos* v.

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the verdict of the jury was his verdict." *Duke*, 527 F.2d at 394. In this case, the court did not force juror Odom to make a decision in open court; the court simply sought to ascertain what juror Odom's actual verdict had been. Unlike the juror in *Sexton*, juror Odom never stated that he had not concurred in the final verdict reached by the jury before it announced that it had reached a verdict.

United States, 496 F.2d at 1273 (citing *Williams* v. *United States*, *supra*, for the proposition that "Rule 31(d) gives the court some latitude in polling of the jury to clear up an apparent confusion" but does not permit the judge to "require[] a jury to reveal its decision when no verdict has been returned.").

In this case, the district court properly attempted to clear up the uncertainty engendered by juror Odom's initial response to the jury poll. When the trial court's second inquiry produced the response, "[s]emi," the district court further questioned him to ascertain whether that comment was meant to indicate that he concurred in the verdict. As the court of appeals correctly concluded, the court's questions were not impermissibly coercive. The meaning of juror Odom's responses to the poll and to the court's initial attempts at clarification were ambiguous; at no point, however, did Odom deny that he had voted for conviction. The district court simply attempted to determine whether juror Odom meant to indicate that he had actually voted for a conviction. Because the court's questions in no way compelled juror Odom to change his decision or to make a decision in the first instance, the questioning did not violate Rule 31(d).[3]

2. Petitioner also contends (Pet. 12-13) that the district court's failure to record bench conferences at which the jury poll was discussed, in violation of 28

[3] This case is quite unlike *United States* v. *McCoy*, *supra*, and *Matthews* v. *United States*, 252 A.2d 505 (D.C. 1969), on which petitioner relies. In both of those cases, a juror gave an equivocal answer during the jury poll; the trial judge did not seek to clarify the meaning of the juror's response, as did the court in this case, but instead instructed the juror to answer yes or no to the question whether the juror concurred in the verdict. The trial judge thus in effect required the juror to reach a verdict in open court. 429 F.2d at 741; 252 A.2d at 506.

U.S.C. 753, requires reversal of his conviction. He contends that this Court should resolve a conflict between the Sixth Circuit's decisions in this case and in *United States* v. *Gallo*, 763 F.2d 1504 (1985), cert. denied, 475 U.S. 1017 (1986), and the Fifth Circuit's decision in *United States* v. *Selva*, 559 F.2d 1303 (1977).

The outcome of the case is consistent with both *Gallo* and *Selva*. In *Selva*, 559 F.2d at 1305, 1306, the court recognized that, ordinarily, "failure to comply with the Act is not error per se and will not work a reversal absent a specific showing of prejudice." It qualified that rule, however, by stating that "[w]hen * * * a criminal defendant is represented on appeal by counsel other than the attorney at trial, the absence of a substantial and significant portion of the record, even absent any showing of specific prejudice or error, is sufficient to mandate reversal."

As the court in *Gallo* recognized, 763 F.2d at 1530, "*Selva* states two different standards depending on whether the same counsel represented defendant at trial and on appeal. If the counsel is the same, *Selva* requires an appellant to show hardship and prejudice before a court will find reversible error"—the same showing that the defendant is required to make under *Gallo*. Because petitioner was represented by the same lawyer on appeal, he is not excused from showing prejudice even under *Selva*. Cf. Pet. App. A21 (discussing application of *Selva* to co-defendant Miller, who retained new counsel on appeal). Moreover, the Fifth Circuit's rule in *Selva* applies only when a "substantial and significant portion of the record" has not been recorded. *Selva*, 559 F.2d at 1306. In this case, the only portions of the proceedings that were not recorded were a number of the bench conferences held in the course of the trial. Pet.

App. A18, A35. Because the failure to record some of the bench conferences at trial is not equivalent to failure to record the entire trial or a "substantial and significant portion" of the trial, the Fifth Circuit's per se rule of reversal set forth in *Selva*, whatever its validity, does not apply to a case such as this one.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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